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VIA ECFS

September 13, 2007

ERRATUM

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. s 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97*

Dear Ms. Dortch:

On August 31, 2007, a joint Opposition was filed in the above-referenced docket on behalf of Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom, Inc. ("Joint Commenters"). The public version of the Opposition filed via ECFS contained certain information incorrectly identified as public. Therefore, Joint Commenters are submitting, through their undersigned counsel, the attached revised public version of the Opposition.

Please do not hesitate to contact me if you have any questions.

Respectfully submitted,



Nirali Patel

*Counsel for Time Warner Telecom Inc.,
Cbeyond Inc., and Eschelon Telecom, Inc.*

Attachment

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
)	
Petitions of Qwest Corporation for Forbearance)	WC Docket No. 07-97
Pursuant to 47 U.S.C. § 160(c) in the Denver,)	
Minneapolis-St. Paul, Phoenix, and Seattle)	
Metropolitan Statistical Areas)	

**OPPOSITION OF TIME WARNER TELECOM INC., CBeyond INC., AND
ESCHELON TELECOM, INC.**

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August 31, 2007

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Time Warner Telecom Inc. ("TWTC"), Cbeyond Inc. ("Cbeyond") and Eschelon Telecom, Inc. ("Eschelon") (collectively, the "Joint Commenters"), by their attorneys, hereby submit this opposition to four petitions for forbearance from unbundling and other regulations filed by Qwest Corporation ("Qwest") in the above referenced docket.¹ As discussed below, the Joint Commenters oppose the Qwest petitions to the extent that those petitions seek forbearance from unbundling and other regulations governing access to Qwest local loop and transport facilities needed to serve business customers.²

¹ See *Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, 22 FCC Rcd. 10126 (WCB rel. June 1, 2007).

² Unlike its petition for forbearance for Omaha, Qwest does not explicitly request forbearance from dominant carrier regulation governing its provision of special access services in the four MSAs at issue in this proceeding. The Joint Commenters have not therefore addressed the need for dominant carrier regulation for special access services in this opposition. Nevertheless, if the

I. INTRODUCTION AND SUMMARY.

In its petitions for forbearance from unbundling and dominant carrier regulation in Denver, Minneapolis, Phoenix and Seattle, Qwest expresses what is no doubt a sincere desire that the Commission cease regulating Qwest's local loop and transport facilities. But Qwest offers virtually nothing in support of this request except empty rhetoric and assertions that are plainly unpersuasive or irrelevant. In fact, by any measure, Qwest retains overwhelming market power over the DS-0, DS-1 and DS-3 loops and in many cases, DS-1 and DS-3 interoffice transport facilities, needed to serve business customers in the four MSAs in question. If the Commission were to deregulate Qwest in the provision of these services, Qwest would be free to act on its powerful incentives to increase wholesale prices, drive competitors from the market and deprive business customers of the lower prices and innovation yielded by competitive markets. The Commission must therefore deny the petitions at least as they pertain to loop and transport facilities needed to serve business customers.

To begin with, there is little doubt that Qwest owns the only local transmission facilities serving the vast majority of commercial buildings in the four MSAs at issue. This is true even when cable companies and other intermodal providers are accounted for. For example, the GAO concluded that competitors have deployed loop facilities to only 5.7 percent of the commercial buildings with demand of DS-1 or greater in Minneapolis, 3.7 percent of such buildings in

Commission were to somehow read the petitions as encompassing a request for the elimination of dominant special access carrier regulation (and it is hard to see how it could do so), all of the information provided herein demonstrates that dominant carrier regulation remains essential to constrain Qwest's exercise of market power in the provision of special access services in the four MSAs for which Qwest has sought forbearance.

Phoenix and 3.8 percent of such buildings in Seattle. While the GAO did not include Denver in its study, Qwest has offered no basis for concluding that there is more competition there than in the other three MSAs.

The data available regarding intramodal competitors' deployment of loop facilities needed to serve business customers confirms Qwest's dominance in all four MSAs at issue. For example, TWTC focuses on serving large and medium-sized business customers, and it constructs loops wherever possible. Nevertheless, TWTC has only been able to construct its own loops to [proprietary begin] [proprietary end] of the commercial buildings in Denver, [proprietary begin] [proprietary end] of the commercial buildings in Minneapolis, [proprietary begin] [proprietary end] of the commercial buildings in Phoenix, and [proprietary begin] [proprietary end] of the commercial buildings in Seattle.

Moreover, there is no basis for concluding that intramodal competitors can reduce Qwest's overwhelming dominance over loop facilities in the foreseeable future. Based on a detailed study of the commercial buildings in the four MSAs at issue, TWTC determined that, even under favorable conditions, it is theoretically possible for it to deploy loops to only [proprietary begin] [proprietary end] of the commercial buildings in Denver to which TWTC has not already deployed loops and that have two DS-1s of demand or greater, [proprietary begin] [proprietary end] of such buildings in Minneapolis, [proprietary begin] [proprietary end] of such buildings in Phoenix, and [proprietary begin] [proprietary end] of such buildings in Seattle. Other

competitors are likely to face the same barriers to expanding their network footprint and are therefore likely to be as limited in their prospects for growth as TWTC.

Nor is there any basis for concluding that cable companies or any other intermodal competitors serving Denver, Minneapolis, Phoenix or Seattle have achieved or could achieve a significant level of success in serving business customers. The clearest indication of cable operators' presence in the business market is the extent to which competitors like Eschelon and Cbeyond have lost customers to cable operators. Yet both companies' churn data, described in detail herein, demonstrates that cable operators are simply not competing in the provision of services to small and medium-sized business customers in the four MSAs at issue. Moreover, the limitations of the geographic reach and technical capabilities of the cable operators' networks, as the Commission has recognized, constrain their ability to serve business customers in the future.

Given the absence of facilities-based competition, it is clear that Qwest cannot meet the Section 10 standard for forbearance. Unbundling requirements are necessary to ensure that Qwest's business retail and wholesale rates are just and reasonable, that consumers are protected against the abuse of Qwest's market power and that the public interest is served. Qwest's conduct in Omaha is obviously a cautionary tale in this regard. As McLeodUSA has explained, Qwest has exploited its new freedom from regulation in that market to increase the prices McLeodUSA pays for DS-0 and DS-1 loops, making it apparently impossible for McLeodUSA either to sustain its presence in the market or even to sell its assets in the market. Absent intramodal competition from McLeodUSA or similarly situated carriers, Omaha businesses will likely have no alternative to Qwest or those businesses lucky enough to have Cox as an

alternative will be forced to purchase service in a duopoly market. As the Commission has recognized, Section 10 forbearance is inappropriate in markets characterized by such conditions.

Competition and consumer welfare in the four MSAs at issue here will suffer the same fate if the instant petitions are granted. For example, Eschelon conducted a study to determine the consequences of forbearance in all four of these markets. Based on the conservative assumption that the elimination of unbundling would cause Qwest to require that Eschelon pay Qwest's special access prices for DS-1 loops applicable under Qwest's standard discount plan and Qwest's post-forbearance Omaha price for DS-0 loops, Eschelon determined that it would be placed in an unsustainable price squeeze. In all four markets, Eschelon would experience

[proprietary begin] [proprietary end] for services it provides via DS1 EEL and DS-0 loops and would experience [proprietary begin]

[proprietary end] for services it provides via stand-alone DS1 loops. Moreover, forbearance would also enable Qwest to unilaterally increase prices for transport facilities because, as discussed herein, Eschelon's study of the wholesale transport market in the four MSAs at issue reveals that Qwest is the only wholesale provider of transport in numerous central offices in which Eschelon is collocated. Accordingly, eliminating Qwest's unbundling obligations in the Denver, Minneapolis, Phoenix and Seattle MSAs is flatly inconsistent with sound public policy and the Section 10 standard.

II. THE COMMISSION MUST APPLY THE APPROPRIATE ANALYTICAL FRAMEWORK WHEN CONSIDERING THE QWEST FORBEARANCE PETITIONS.

In its petitions, Qwest seeks forbearance from, among other things, loop and transport unbundling. Under Section 10, forbearance shall be granted only where (1) a legal requirement

is no longer necessary to ensure the “charges, practices” and “classifications” of service offered by a carrier are just, reasonable, and not unjustly or unreasonably discriminatory; (2) the legal requirement is no longer necessary for the protection of consumers; and (3) a grant of forbearance comports with the public interest.³ In assessing forbearance petitions similar to the ones at issue here, the Commission has focused on whether competition is sufficient to satisfy this standard in the absence of the unbundling obligations for which forbearance is sought.⁴ In conducting this analysis with regard to the four petitions at issue in this proceeding, the Commission must utilize appropriate geographic and product markets, and it must grant forbearance only where sufficient facilities-based competition has taken root in the relevant market. In this regard, the Commission’s unbundling analysis in particular must be informed by its own precedent, its past mistakes in granting forbearance based on predictive judgments that have been proven to be incorrect, and sound competition policy.

First, there is now little controversy that the appropriate geographic market for reviewing petitions for forbearance from unbundling local transmission facilities is no larger than individual wire centers. The Commission adopted wire centers as the geographic market for assessing unbundled network element (“UNE”) loop forbearance petitions in both Omaha and Anchorage. *See Omaha Order* ¶¶ 60-61; *Anchorage Order* ¶¶ 14-16. In both *Orders*, the

³ 47 U.S.C. § 160(a)(1)-(3).

⁴ *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 1 (2005) (“*Omaha Order*”); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958, ¶¶ 27-30 (2007) (“*Anchorage Order*”).

Commission rejected ILEC requests that it utilize a larger geographic area. There is no basis for departing from this approach here. The large geographic areas covered by the four MSAs for which Qwest seeks forbearance all appear to contain “substantial topographical and density variations” and are not subject to uniform levels of competitive entry. *Anchorage Order* ¶ 15.

Second, it is critical that the Commission adopt and consistently utilize appropriate product markets for its analysis. This means that the Commission should assess the extent to which competition, including intermodal competition, exists with regard to “each loop type”⁵ and each transport type. As the Commission stated in the *Anchorage Order*, this “remains the best way to structure [the] forbearance analysis.” *Id.* ¶ 13. In conducting each product-specific analysis, the Commission has appropriately emphasized the need to analyze the extent to which competitors can provide services that are “substitutes” for ILEC services in the absence of UNEs. *See Omaha Order* ¶ 65. This means that the Commission must separately analyze the extent to which facilities-based competition exists at both the retail and wholesale levels for the services that ILECs provide *via* DS-0 loops (including xDSL services demanded by small business customers), DS-1 loops, and DS-3 loops as well as DS-1 and DS-3 transport.

It is of course not enough to describe the appropriate geographic and product markets. The Commission must actually conduct a separate analysis for each relevant market as appropriate. Unfortunately, the Commission failed to do so in either the *Omaha Order* or *Anchorage Order*. For example, in the *Omaha Order*, the Commission relied on aggregate

⁵ *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 210 (2005) (“*TRRO*”).

numbers of DS-0, DS-1 and DS-3 circuits sold by competitors to businesses across the nine wire centers in which it granted forbearance. *See id.* ¶ 69. But aggregate data across multiple wire centers offers no basis for granting forbearance in any particular wire center where competition for one or all of these circuits could be non-existent or *de minimis*. Similarly, in both the *Omaha Order* and the *Anchorage Order*, the Commission relied on aggregate data regarding cable network coverage for both residential and business customers (*see Omaha Order* ¶ 69; *Anchorage Order* ¶ 21), but such average data offers no reliable indication of a cable operator's network coverage for either the circuits demanded by residential customers or the circuits demanded by business customers. Furthermore, the Commission relied on Cox Communications Inc.'s ("Cox's") success in the residential market as a basis for predicting that it would have similar success in the business market (*see Omaha Order* ¶ 66), without offering any basis for concluding that this would be the case. The conflation of separate markets in this manner is flatly inconsistent with the Commission's stated objective of separately analyzing the extent to which competitors' facilities, and the services they provide over those facilities, comprise "substitutes" of "each loop type" for which forbearance was sought. The Commission must not repeat this mistake in the instant proceeding.

Third, forbearance should not be granted in any relevant market unless facilities-based competitors' *end user connections* within such market are ubiquitous enough to ensure that Qwest's price and non-price conduct will be disciplined absent unbundling obligations or dominant carrier regulation. For example, in both the *Omaha Order* and *Anchorage Order*, the Commission granted forbearance from Section 251(c)(3) unbundling obligations only in wire centers in which at least one intermodal competitor was offering service over its own "extensive

last mile facilities.” *Omaha Order* ¶ 59; *see also Anchorage Order* ¶ 31 (applying “extensive” intermodal coverage standard because of “the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention”). The Commission has concluded that granting forbearance in wire centers “where no competitive carrier has constructed substantial competing ‘last mile’ facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition.” *Omaha Order* ¶ 60.

The Commission’s measure for determining whether an intermodal competitor’s last mile facilities have achieved “extensive” or “substantial” presence in a wire center and in a product market is the “coverage” of end users. That is, a particular customer location is deemed to count toward the requirement of “extensiveness” or “substantiality” only where the intermodal competitor “uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.” *Omaha Order* n.156; *see Anchorage Order* ¶ 32 (applying coverage standard). Accordingly, an intermodal competitor’s network does not “cover” a customer location unless the competitor is able to serve that location with the full range of services offered in the relevant product market in a timeframe that is equal to or less than the time it takes for a reasonably efficient competitor to provide such services. Furthermore, the intermodal competitor must have substantial enough coverage in the wire center that “all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates.”⁶

⁶ *Omaha Order* ¶ 69. In the *Anchorage Order*, the Commission inexplicably seemed to depart from this standard and concluded that GCI’s network covered customer locations that GCI would

But ubiquitous “coverage” by a single intermodal competitor by itself is not enough to meet the requirements of Section 10 for either the retail or the wholesale market. The Commission has held that the Section 10 standard is only met in the retail market if the intermodal competitor has demonstrated substantial success in winning retail market share by providing services over its own network. *See Omaha Order* ¶ 64, n.177, ¶ 69; *see also Anchorage Order* ¶ 28.

Moreover, in the *wholesale* market, a single facilities-based competitor is insufficient to meet the requirements of Section 10. As the Commission explained, it is critical that facilities-based wholesale competition “minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct.” *See Omaha Order* ¶ 71; *see also Anchorage Order* ¶ 46 (relying on continued rate regulation of ACS to prevent the development of “an impermissible duopoly”). To ensure this outcome, the record must support the conclusion that there is enough facilities-based wholesale competition so that the ILEC has “very strong market incentives” to offer loops and transport on a wholesale basis to competitors on terms and conditions that allow efficient competitors to compete even if UNEs are eliminated. *Omaha Order* ¶ 81; *see Anchorage Order* ¶¶ 39-42 (relying on continued regulation to assuage concerns regarding the adequacy of

only be able to serve after it completed its network upgrade, which will take one-to-two years. *See id.* ¶ 36, n.114. Incredibly, the Commission even went so far as to suggest to GCI ways in which it could serve customers over its existing facilities. *See id.* n.122. Nevertheless, later in the *Anchorage Order*, the Commission candidly expressed “concerns” that, in fact, GCI “is unable to provide symmetric high-speed service over its cable plant or otherwise unable to provide particular services to particular customers.” *Id.* ¶ 41. In any event, the Commission emphasized that market conditions and GCI’s participation in the market in Anchorage are “unique.” *Id.* Thus, the Commission’s arbitrary finding that GCI “covers” customer locations that it cannot serve for one or two years should have no bearing on the instant petitions.

competition in Anchorage). In determining whether this is the case, the Commission may not infer from the presence of a cable operator's loop and transport facilities that others could deploy such facilities.⁷ The Commission also may not rely on the availability of special access or Section 271 UNEs as a basis for eliminating UNEs. *See TRRO* ¶¶ 46-63.

Again, the Commission must consistently apply these standards. It has not done so in the past. For example, rather than conduct an analysis of the competitiveness of the wholesale market in Omaha, the Commission relied on a baseless "predictive judgment" that the presence of a single competitor—a cable operator—with limited network coverage among business customers would give Qwest the incentive to offer competitors access to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport needed to serve business customers on reasonable terms and conditions that would support efficient competitive entry. Not surprisingly, this predictive judgment has proven to be incorrect, as explained in Section IV.A *infra*. McLeodUSA's experience in Omaha since the elimination of UNEs illustrates the need for the Commission to ensure that higher levels of facilities-based wholesale competition exist than was the case in Omaha before eliminating unbundled loops and transport needed to serve businesses.

Finally, the Commission must ensure that interested parties have a meaningful opportunity to assess and comment on data regarding facilities-based entry in the relevant markets. As explained below, Qwest offers little of substance to support its petitions. This is in

⁷ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd. 16978, ¶ 310 (2003), *subsequent history omitted* ("TRO") (deployment of facilities by intermodal competitors that benefit from "unique" advantages is largely irrelevant to whether other competitors could efficiently deploy the similar facilities).

part due to the paucity of competition in the relevant markets. But the Commission will likely seek information from the few facilities-based competitors, in particular, cable companies, as part of its assessment of the merits of the Qwest petitions. If so, the Commission must ensure that such information is made available to interested parties soon enough that companies and their outside experts have a meaningful opportunity to analyze that information and submit that analysis into the record. The D.C. Circuit has consistently held that failing to make critical factual information available to interested parties on a timely basis in a rulemaking proceeding violates the requirements of the Administrative Procedure Act (“APA”), *see* 5 U.S.C. § 553(c), and is reversible error. *See, e.g., Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (citing *Conn. Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (same); *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (same).

III. BY ALL AVAILABLE MEASURES, QWEST RETAINS OVERWHELMING MARKET POWER OVER LOCAL TRANSMISSION FACILITIES NEEDED TO SERVE BUSINESS CUSTOMERS.

The available evidence demonstrates that Qwest continues to control the only viable transmission facility for serving the vast majority of business locations in its territory. This is true, even if one accounts for both intramodal and intermodal (including cable) competitors. Moreover, Qwest has offered no basis in its petitions to doubt that this is the case with regard to any wire center in the four MSAs at issue in which it is still obligated to provide unbundled DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport needed to serve business customers. Even in the small business market, in which cable companies have apparently made some modest competitive entry by offering substitutes for services such as xDSL that rely on DS-0 unbundled

loops, there is no evidence that a viable wholesale market would exist if unbundled DS-0 loops were eliminated.

Qwest's control of bottleneck local transmission facilities (loops and transport) demonstrates that the continued availability of unbundled DS-0, DS-1 and DS-3 unbundled loops and DS-1 and DS-3 transport is (1) "necessary to ensure that the charges, practices," and "classifications" of services provided to small, medium and large businesses in the six markets at issue are "just, reasonable" and "not unjustly or unreasonably discriminatory;" and (2) "necessary for the protection of consumers" against higher prices charged by Qwest and foregone competition and innovation from UNE-based competitors. Denial of Qwest's request for UNE forbearance is also in the public interest for the similar reason that granting the request would lead to less competition, higher prices and less innovation for all business customers in all of the markets in which Qwest seeks this relief.

A. The GAO And The FCC Itself Have Concluded That There Is No Basis For Granting Qwest's Petitions For Forbearance From Unbundling Loops Or Transport Needed To Serve Businesses.

The Government Accountability Office ("GAO"), in a recent report on the market for dedicated access services, and the FCC, in the *TRO*, *TRRO* and to some extent in the recent *Qwest Sunset Order*, have examined the competitiveness of the local transmission market generally, and in the Qwest region specifically. Both of these agencies have reached the same conclusion: Qwest has overwhelming market power over the upstream loop and transport inputs needed to serve small, medium and large business customers. Importantly, both the GAO's and FCC's conclusions accounted for the presence of cable, wireless and other intermodal competitors.

In a November 2006 report, the GAO determined that competitors have deployed few facilities in Qwest's markets or nationwide. The report found that, based on data from third-party telecommunications industry data vendors GeoResults and Telcordia, competitors have deployed transmission facilities to less than five percent of the buildings demanding at least DS-1 level service in the 16 markets studied.⁸ As the GAO found, nearly all of the loops that competitors have deployed are well above the DS-1 level of capacity. In light of long-standing entry barriers, the GAO concluded that "wireline facilities-based competition itself may not be a realistic goal for some segments of the market for dedicated access Where demand for dedicated access is less than 3 or 4 DS-1's [sic], it would appear unlikely that any competitor would extend its network for that business." *GAO Report* at 42. Moreover, the GAO emphasized that its study took into account *both intramodal and intermodal competition* (including cable companies and wireless providers). *See id.* at 47.

The GAO studied three of the four Qwest MSAs at issue here. It found that competitors had deployed loop facilities to only to 5.7 percent of the commercial buildings with demand of DS-1 or greater in Minneapolis, 3.7 percent of such buildings in Phoenix, and 3.8 percent of such buildings in Seattle. *Id.* at 20. As the GAO explained, most of the loops deployed by competitors provide two DS-3s or higher of capacity. As a result, competitors likely have deployed loops to well below 5.7, 3.7, and 3.8 percent of the customer locations in Minneapolis,

⁸ See *GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) ("*GAO Report*"). The GAO acknowledged that GeoResults data could overcount or undercount the number of buildings served by CLECs and one "price-cap incumbent" suggested that GAO may be undercounting by as much as 30 percent. Even if this were the case, "competitive alternatives exist in a relatively small subset of buildings." *Id.*

Phoenix, and Seattle, respectively, that are most relevant to this proceeding—those with demand of a single DS-3 of capacity or less.

Of course, the FCC reached very similar conclusions regarding ILECs' market power in the *TRO* and the *TRRO*. In the *TRO*, the Commission found that competitors had deployed loop facilities to only three to five percent of the commercial buildings nationwide.⁹ Moreover, in the *TRRO*, the FCC found that it is "rarely if ever economic" for a reasonably efficient competitor to construct DS-1 loops in the vast majority of wire centers in the country. *TRRO* ¶ 166. And, as Qwest itself has recently acknowledged, the Commission took into account "the role of intermodal competition" in the *TRRO*.¹⁰

As if the findings of the GAO Report, *TRO*, and *TRRO* were not proof enough, as recently as March 2007, in the *Qwest Sunset Order*,¹¹ this Commission held that Qwest retains a monopoly over essential local transmission facilities:

Qwest has failed . . . to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over ubiquitous telephone exchange service and exchange access network. We therefore assume, for the purposes of this proceeding, that Qwest continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities.

⁹See *TRO* ¶ 298 n.856 (stating that both "competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops").

¹⁰ See Comments of Qwest Communications Int'l, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25, at 7 & n.13 (filed Aug. 8, 2007) (citing *TRRO*).

¹¹ *In the Matter of Petition of Qwest Communications, Int'l Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 47 (rel. Mar. 9, 2007) ("*Qwest Sunset Order*").

Id. ¶ 47 (citing *LEC Classification Order*, 12 FCC Rcd. 15756, 15762-63, ¶ 134 (1997)).

Qwest has offered no basis in the instant petitions for the Commission to question the validity of this conclusion in the four markets in which Qwest seeks forbearance.

B. Qwest Has Not, And Cannot, Demonstrate That Facilities-Based Competition From Intramodal Competitors In Any Wire Center Within The Four MSAs Is Sufficient To Justify Forbearance.

The available evidence concerning the extent to which intramodal competitors,¹² considered separately from intermodal competitors, have or could deploy their own loop or transport facilities confirms that continued availability of unbundled DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport is necessary to ensure that business services are offered on terms and conditions that are just, reasonable and not unjustly or unreasonably discriminatory. This is particularly true with regard to the specific MSAs for which Qwest seeks forbearance.

1. The Joint Commenters' And Other Intramodal Competitors' Experiences Demonstrate That They Are Unable To Deploy The Loops Or Transport Facilities For Which Qwest Seeks Forbearance

The Joint Commenters' attempts to self-deploy loop and transport facilities underscores Qwest's continued dominance in the market for loop and transport facilities capable of serving business customers. Qwest derives its market power from the combination of its first-mover advantage of having sunk the investment in loop and transport facilities while competitors "face substantial operational barriers to constructing their own facilities." *TRRO* ¶ 151. As Stephanie Pendolino, TWTC's Director of Business Intelligence Reporting & Analytics, explains in her

¹² See *TRO*, Separate Statement of Commissioner Kathleen Q. Abernathy, at 3 (defining intramodal competition as "competitive LECs using their own facilities and incumbents' loops and subloops").

declaration, a competitor can overcome the relevant entry barriers where the revenue opportunity in a building is sufficient to cover the total cost of construction and recurring expenses and at the same time, achieve a reasonable rate of return on investment.¹³ These costs vary based on, among other things, (1) the proximity of a given customer location to TWTC's transport network (the longer the lateral facility, the higher the deployment cost); (2) costs associated with obtaining access on reasonable terms and conditions to poles, ducts, conduits, rights-of-way and commercial buildings; (3) the type of services provided (electronics for higher capacity services generally cost more than those for lower capacity services); and (4) the customer's willingness to enter into a long-term contract. *See id.* Under the best of circumstances, competitors can generally overcome these barriers for customers that purchase multiple DS3s of capacity pursuant to multi-year contracts or Ethernet services yielding similar revenue opportunities.¹⁴ Similarly, it is not efficient for competitors to deploy transport facilities along routes that do not support sufficient traffic volumes and their associated revenue opportunities. Kunde Dec. ¶ 5. Moreover, as David Kunde, Eschelon's Executive Vice President of Network Operations and Engineering, explains, "even if it were theoretically rational to construct loop or transport facilities, there are numerous obstacles associated with large-scale loop or transport self-deployment, including lack of space in existing conduits and municipalities' increasing

¹³ *See* Declaration of Stephanie Pendolino On Behalf Of Time Warner Telecom Inc. ¶ 5 (attached hereto as Attachment A) ("Pendolino Dec.").

¹⁴ *See id.* ¶¶ 5-6; *see also* Declaration of David A. Kunde On Behalf Of Eschelon Telecom, Inc. ¶ 5 (attached hereto as Attachment B) ("Kunde Dec.").

unwillingness to permit access to public rights-of-way already overburdened by other utilities.”

Id.

For these reasons, even TWTC, which serves predominantly medium and large businesses and likely deploys loop facilities at a faster pace than any other competitor, is unable to deploy loops to the vast majority of its customer locations. Nationwide, legacy TWTC (excluding Xspedius) served approximately 27 percent of its customer locations on-net as of September 2006. The circumstances are no better in the relevant Qwest MSAs. Indeed, Ms. Pendolino states that TWTC has been able to deploy its own loop facilities to only [proprietary begin] [proprietary end] of its customer locations in Seattle, [proprietary begin] [proprietary end] of its customer locations in Minneapolis,¹⁵ [proprietary begin] [proprietary end] of those in Denver, and a mere [proprietary begin] [proprietary end] of customer locations in Phoenix. *Id.* Furthermore, TWTC has deployed loop facilities to a miniscule segment of the aggregate commercial buildings in each MSA, as counted by GeoResults. *Id.* TWTC has constructed loops to a mere [proprietary begin] [proprietary end] of the commercial buildings in the Denver MSA, [proprietary begin] [proprietary end] of the commercial buildings in the Minneapolis MSA, [proprietary begin] [proprietary end] of those in the Phoenix MSA, and [proprietary begin] [proprietary end] of those in the Seattle MSA. *Id.*

¹⁵ As Ms. Pendolino explains, TWTC serves fewer customer locations in Minneapolis than in most of TWTC’s other markets. *See* Pendolino Dec. ¶ 5. This has caused the percentage of TWTC’s on-net buildings in that market to be unusually high. As explained below, however, TWTC has not and could not build its own loop facilities to the overwhelming majority of the commercial buildings in Minneapolis.

Beyond those buildings to which TWTC has already self-deployed loops, there are few locations to which it is even *theoretically possible* to construct loops in the future. *Id.* ¶ 8. For example, TWTC conducted a study to identify such buildings in the Denver, Minneapolis, Phoenix, and Seattle MSAs. As Ms. Pendolino explains, this build-buy analysis is based on the assumptions that: (1) TWTC must earn an approximate monthly recurring revenue (“MRR”) of [proprietary begin] [proprietary end] (*i.e.*, the amount required to reach the company’s target on-net building rate of return over a 36-month period beyond expected deployment costs) (*see id.* ¶ 6); and (2) TWTC can capture [proprietary begin] [proprietary end] percent of the revenue opportunity in a commercial building— a conservative estimate since TWTC is often unable to capture this level of demand in a building. *See id.* ¶ 7. TWTC relied on GeoResults data estimating the potential revenue spend in the commercial buildings with two DS-1s of demand or more in the four MSAs in question to determine the percentage of such buildings to which it has not constructed its own loops (“non-TWTC buildings”) but to which it might ultimately be able to do so. *See id.* ¶ 8. The results of this analysis are that TWTC *might, under favorable circumstances*, be able to serve only [proprietary begin] [proprietary end] of non-TWTC buildings in Denver, [proprietary begin] [proprietary end] of non-TWTC buildings in Minneapolis, [proprietary begin] [proprietary end] of non-TWTC buildings in Phoenix, and [proprietary begin] [proprietary end] non-TWTC buildings in Seattle. *Id.* Ms. Pendolino explains that these results assume that the various barriers to entry described above are overcome (which is anything but certain), but it does not account for the fact that TWTC cannot even begin building its own

loops unless and until potential customers in a particular building actually commit to purchasing the high revenue services that support loop construction. *See id.* ¶ 9.

In the many commercial buildings and business locations to which loop self-deployment is not economic, there is almost never a non-ILEC wholesale provider of loop connectivity. Even many transport routes lack a single non-ILEC source of wholesale transmission. Competitors' experience is therefore that they have no choice but to purchase from Qwest in the four MSAs that are the subject of the Qwest forbearance petitions.

For instance, Cbeyond relies exclusively on Qwest DS-1 unbundled loops or enhanced extended links ("EELs") to serve its small and medium-size business customers cost-effectively.¹⁶ In addition, Mr. Kunde states that, despite Eschelon's preference to purchase loops and transport from non-ILEC wholesale providers, "the marketplace reality is that few such alternatives exist." Kunde Dec. ¶ 6. Eschelon relies exclusively on Qwest loops to serve business customers in the four MSAs at issue. *See id.* In addition, Mr. Kunde observes that numerous Eschelon collocations cannot be served by a non-ILEC wholesale transport provider, particularly in the Denver and Phoenix MSAs. *See id.* In the Phoenix MSA, Eschelon is collocated in [proprietary begin] [proprietary end] central offices, but Eschelon has been unable to identify a single wholesale transport provider other than Qwest in [proprietary begin] [proprietary end] of those central offices.¹⁷ Similarly, in Denver, Eschelon

¹⁶ *See* Declaration of Richard J. Batelaan On Behalf Of Cbeyond, Inc. ¶ 4 (attached hereto as Attachment C) ("Batelaan Dec.").

¹⁷ *See* Kunde Dec. ¶ 6 & Exhibit 1 (attached thereto) (listing these [proprietary begin] [proprietary end] central offices).

has been unable to identify a single non-ILEC wholesale transport provider in **[proprietary begin]** **[proprietary end]** of those central offices in which Eschelon is collocated.¹⁸ In those locations where TWTC cannot deploy its own loop facilities, it is also forced to rely on Qwest's facilities to serve its enterprise customers. As Ms. Pendolino explains, this is because "Qwest usually owns the only loop facility serving locations to which TWTC cannot efficiently deploy its own facilities." Pendolino Dec. ¶ 10.

The Joint Commenters' experience is typical. Nearly every one of the intramodal competitors cited by Qwest as competing for enterprise customers in the four MSAs in question has stated that it cannot deploy loop facilities at the DS-1 level and, in most cases, they can only deploy loops at locations that demand multiple DS-3s of capacity. Moreover, as they indicated, many of these carriers rely heavily on UNEs, not special access facilities. Intramodal carriers operating in the four MSAs at issue generally restrict their purchase of special access to circumstances in which UNEs are unavailable due to the operation of the *TRRO* impairment triggers or where Qwest rejects UNE orders due to the purported absence of facilities or some other excuse.¹⁹ If forced to rely exclusively on special access facilities, many (probably most) of

¹⁸ See *id.* & Exhibit 2 (attached thereto) (listing these **[proprietary begin]** **[proprietary end]** central offices).

¹⁹ Indeed, the experience of many of these carriers with respect to the BOCs' unlawful manipulation of the UNE rules formed the basis for the FCC to reject the use of special access as a substitute for UNEs in the *TRRO*. See, e.g., *id.* ¶ 64 ("In short, in many cases, it appears that carriers expected to transition to UNEs – and pursued business models relying on this eventuality – but committed to long-term special access contracts in the interim.") (internal citations omitted).

these carriers would have to exit the market. The relevant intramodal competitors' market experiences are as follows.

- AT&T:
 - AT&T cannot serve two DS-3s or less of capacity unless the location is within 88 feet of its network splice point. *See* AT&T Comments, WC Dkt. Nos. 04-313 et al., at 36 (filed Oct. 4, 2004).
 - AT&T can only reach ten percent of its target market with its own loop facilities. *See* AT&T *ex parte* presentation, CC Dkt. No. 01-338 (filed Jan. 7, 2003).
 - Where AT&T must rely on ILEC special access as an input, it cannot offer Ethernet service profitably at retail. AT&T Comments, WC Dkt. Nos. 04-313 et al., Attach. B, Benway et al. Declaration ¶ 103 (filed Oct. 4, 2004).
- Broadwing
 - It is never economical for Broadwing to deploy its own loop facilities. Broadwing WC Dkt. 05-25, at 11 (filed June 13, 2005).
 - The ILECs maintain a near monopoly over the DS-1 loop facilities that Broadwing demands. *Id.*
- Cavalier
 - Construction of loops in urban areas is often prohibitively expensive and Cavalier will only construct such facilities if there is demand for "several DS-3 circuits" at a particular location. ALTS et al. Comments, App. I, Declaration of Brad A. Evans, WC Dkt. Nos. 04-313 et al., ¶ 20 (filed Oct. 4, 2004).
 - Cavalier experiences rejections for UNE orders from Verizon at a rate of 23 percent for DS-1 loops and 79 percent for DS-3 loops. *Id.* ¶ 22.
- Covad
 - Covad has not deployed DS-1 loops and instead relies exclusively on the ILEC for such facilities. Covad Comments, Joint Declaration of Stephan Derodeff et al., WC Dkt. Nos. 04-313 et al., ¶ 44 (filed Oct. 4, 2004).
 - Covad only purchases special access when UNEs are unavailable and based on the presumption that these circuits can quickly be converted to

UNEs. Covad Reply Comments, WC Dkt. Nos. 04-313 et al., at 34 (filed Oct. 19, 2004). Typically, 35 to 40 percent of DS-1 UNE of Covad's orders are rejected by Verizon because facilities are "unavailable." Joint Letter of Covad et al., CC Dkt. Nos. 01-338 et al., at 2 (filed Aug. 9, 2004).

- Covad cannot profitably provide DS-1 services to business customers if forced to purchase all of its DS-1 services as special access. Special access prices are generally 150 to 250 percent higher than UNE prices. Covad Comments, Joint Declaration of Stephan Derodeff et al., WC Dkt. Nos. 04-313 et al., ¶ 45 (filed Oct. 4, 2004).
- In the NY MSA, the monthly rate for DS-1 transport is approximately 400 percent higher than the rate for DS-1 UNE transport. *Id.* ¶ 51.

➤ Level 3

- Level 3 "finds it largely impossible to find viable alternatives to ILEC special access services." Level 3 Opposition, WC Dkt. No. 05-333, at 10-11 (filed Jan. 23, 2006).

➤ Sprint

- As of the end of 2004, "Sprint relied upon the RBOC for almost 95 percent of its DS-1 circuits and 83 percent of its DS-3 circuits." Comments of Sprint, WC Dkt. No. 05-25, at 7 (filed June 13, 2005).

➤ XO

- Less than 25 percent of XO's DS-1 circuits are special access while more than 75 percent are purchased as UNEs. Tirado Declaration ¶ 44, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. No. 04-313 (filed Oct. 4, 2004) ("*Tirado Declaration*").
- If XO were forced to purchase exclusively special access DS-1s, it could not compete. XO Emergency Petition for Expedited Determination that CLECs are Impaired Without DS-1 UNE Loops, WC Dkt. Nos. 04-313 et al., at 30 (filed Sept. 29, 2004) ("*XO DS-1 Petition*").
- Even under term and volume commitment plans, XO must pay 20 percent to 300 percent higher for special access DS-1 and DS-3 loops than for UNEs. *Tirado Declaration* ¶ 42.
- It is almost never economic for XO to construct its own DS-1 facilities. *Id.* ¶ 21.

- XO has rarely been able to purchase DS-1 and DS-3 loop facilities from other CLECs. In XO's experience, CLECs offer DS-1 and DS-3 loops on a wholesale basis to fewer than five percent of the buildings that XO seeks to serve. *Id.*
 - It is never economic for XO to deploy DS-1 transport. *Id.* ¶ 35.
 - When XO orders special access, it never does so by choice, but it is often forced to do so because of Verizon's "no-facilities available" policy. *XO DS-1 Petition* at 31.
 - Verizon makes XO wait 90 days to convert a special access DS-1 to a UNE and one year to convert a special access DS-3 to a UNE. *Tirado Declaration* ¶ 47.
- Xspedius (now part of TWTC)
- "It is almost never economic for Xspedius to construct its own DS-1 wireline loop facilities." Declaration of James C. Falvey ¶ 26, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 et al. (filed Oct. 4, 2004).
 - Xspedius generally requires at least 3 DS-3s of demand to construct a loop. *Id.* ¶ 23.
 - It would never be economic for Xspedius to deploy DS-1 transport facilities and Xspedius has never done so. *Id.* ¶ 29.

Furthermore, competitors' reliance on Qwest's loops and transport is only likely to increase in the future as customers increasingly demand that carriers serve most or all of their locations. As Ms. Pendolino explains, in the past, a ten-location customer may have required TWTC to serve only its two largest locations, but today, it is more likely that the customer will demand that TWTC serve all ten of its locations. *See Pendolino Dec.* ¶ 11. Although it may have been economically rational for TWTC to build loops to the customer's two largest locations (in both size and revenue generation), TWTC will in all likelihood be unable to construct loops to the smaller locations, which sometimes generate well below \$1000 in monthly revenue. *Id.*

TWTC's only alternative to reach those locations is Qwest's loop facilities. *Id.* Thus, as Ms. Pendolino explains, "in order to justify constructing loops to multiple customer locations, it is more and more important that TWTC be able to purchase loops from Qwest on reasonable terms and conditions." *Id.*

2. Qwest Provides No Evidence That Intramodal Competitors Are Able To Deploy The Loops Or Transport Facilities For Which It Seeks Forbearance.

Qwest relies on several sources of retail competition in an apparent attempt to demonstrate that the retail enterprise services market is "highly competitive."²⁰ This assertion is not credible, however, because each of the alleged sources of retail competition exists *precisely because of* CLECs' access to the very same unbundled loop and transport facilities that Qwest seeks to cease providing.

First, Qwest's reliance on the provision of retail services by CLECs relying on UNEs or resale is misplaced because such information offers no indication as to whether non-ILECs have or could compete using their own loops or transport.²¹ *Second*, neither "systems integrators" nor VoIP providers (*see, e.g.*, Qwest Minn. Pet. at 25-26) constitutes a facilities-based alternative to Qwest for retail business services because both are simply applications or systems that rely on local transmission facilities provided by a carrier (usually Qwest). *Third*, white pages listings

²⁰ *E.g.*, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area, WC Dkt. No. 07-97, at 21 (filed Apr. 27, 2007) ("Qwest Minn. Pet.").

²¹ *See, e.g., id.*; *see also* Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, ¶ 23 (attached to Qwest Minn. Pet.) ("Brigham-Teitzel Minn. Dec.").

(*see, e.g., id.* at 23-24) and aggregate data on declines in Qwest's retail business lines (*see, e.g., id.* at 27-28) are equally irrelevant because there is no way to know how many of the competitors' customers represented in this data are served via Qwest's local transmission facilities or even whether the inputs for the services at issue are the same as those for which Qwest seeks forbearance (*i.e.*, DS-0, DS-1, or single DS-3 loops, and DS-1 or DS-3 transport).

Fourth, Qwest offers the number of fiber miles constructed by competitors and the number of buildings that such fiber serves as evidence of the existence of facilities-based competition. *See, e.g., Brigham-Teitzel Minn. Dec.* ¶ 10. But the mere presence of fiber deployed by competitors (*see, e.g., Qwest Minn. Pet.* at 26-27) is meaningless because each of the Joint Commenters, whose experience is typical of other competitors in the relevant MSAs, has stated that it cannot deploy loops to provide DS-1 or single DS-3 capacity service. Competitors have deployed a great deal of fiber that does not and cannot connect to end user locations. The existence of alternative local loops cannot therefore be inferred from the mere deployment of fiber near commercial buildings. As the Commission has held, data regarding the number of fiber route miles is an "unreliable" and "unsuitable" indicator of the level or likelihood of loop deployment. *See TRRO* ¶ 110. In fact, in defending the *TRRO* before the D.C. Circuit, the FCC estimated that only one-fifth of the thousands of transport route miles that the ILECs claimed were concentrated in areas where demand for high capacity facilities was greatest could actually be used to provide local services.²² There is every reason to think that Qwest has resorted to the same sort of overcounting in this proceeding.

²² *See* Brief for Respondents, *Covad Communications Co. v. FCC*, No. 05-1095, at 65 (D.C. Cir. filed Oct. 20, 2005).

In addition, Qwest relies on data from an entity called “GeoTel” for the propositions that “competitive fiber” now serves more than 1,300 buildings in Denver, 1,000 buildings in Minneapolis, 1,800 buildings in Phoenix, and more than 1,000 buildings in Seattle. *See, e.g.,* Brigham-Teitzel Minn. Dec. ¶ 10. However, unlike GeoResults, a vendor whose data regarding the provision of dedicated access services to commercial buildings are routinely used by wireline incumbents and competitors alike, the Joint Commenters are entirely unfamiliar with GeoTel. Moreover, Qwest fails to identify GeoTel or describe its experience and expertise in conducting studies for FCC proceedings such as this one. More importantly, Qwest fails to describe or provide the data or methodology that GeoTel relied upon to generate these seemingly inflated figures. Nor do the Joint Commenters or other parties have any independent means of verifying the reliability of such data. There is therefore no basis for the Commission to give any credence to conclusions purportedly reached by GeoTel.

Qwest’s discussion of Joint Commenters’ and other CLECs’ businesses and services is illustrative of Qwest’s failure to support its assertion that the market for loop and transport facilities is competitive. For instance, Qwest asserts that Eschelon’s offering of a VoIP service, “provided over its own managed network,” called Precision Flex-Pak, is evidence of retail competition in business services. *E.g.,* Brigham-Teitzel Minn. Dec. ¶ 28. However, this VoIP service and those offered by other CLECs cited by Qwest, including McLeodUSA (*id.* ¶ 30), Covad (*id.* ¶ 29), and XO (*id.* ¶ 33), depend upon the last-mile connectivity provided by Qwest. Indeed, as Mr. Kunde’s Declaration on behalf of Eschelon makes abundantly clear, Eschelon cannot economically deploy its own loop and transport facilities and instead relies on Qwest’s

loops and transport facilities to provide services to small and medium-sized businesses in the four MSAs at issue. *See* Kunde Dec. ¶¶ 5-6; *see also* Section III.B.1 *supra*.

Messrs. Brigham and Teitzel's discussion of Integra also does nothing to demonstrate the existence of the *facilities-based* retail competition needed to justify forbearance. *See, e.g.,* Brigham-Teitzel Minn. Dec. ¶ 27. To show "evidence" of such competition, Qwest points to a study conducted on behalf of Integra which estimated that "Qwest held 42% of the business market [in the Minneapolis MSA] while the combination of Comcast, Global Crossing (fka [sic] Frontier), Eschelon, AT&T, McLeod, Integra (prior to the [Electric Lightwave] acquisition), POPP, Verizon and Sprint held 30% of the business market." *Id.* The fact that Qwest's market share in Minneapolis is purportedly 42 percent (Qwest does not describe the methodology used to arrive at this percentage) of some undefined product market while the share of *nine other LECs combined* is 30 percent is not indicative of the extent to which Qwest controls the bottleneck local transmission facilities. Rather, Qwest's market share of the high capacity loops serving businesses below two DS-3s is the relevant issue in this proceeding. In addition, Messrs. Brigham and Teitzel's emphasis on Integra's increased revenues as a result of its acquisition of Eschelon (which is expected to close on August 31, 2007) ignores the fact that Eschelon relies exclusively on ILECs such as Qwest for loop facilities. Thus, Messrs. Brigham and Teitzel's statement that "Integra is well positioned with its acquisition of . . . Eschelon[] to make even greater inroads into the small business and enterprise business markets in the area" is both unfounded speculation and irrelevant. *Id.* The real question is whether the combined Integra-

Eschelon could somehow construct loop and transport facilities in the many locations in which no competitor can do so today. The answer is that they cannot.²³

C. Intermodal Competition In The Provision Of DS-1 Or DS-3-Based Services To Businesses In The Four MSAs In Which Qwest Seeks Forbearance Is Virtually Non-Existent.

There is simply no evidence that there is sufficient competition in the business market from cable competitors to meet the requirements of Section 10.

1. The Available Evidence Demonstrates That Cable Companies Are Not Competing Extensively In The Business Market.

All of the available information regarding the technical characteristics of cable networks, cable companies' entry thus far into the business market, and cable companies' plans to serve business customers indicate that competition from cable for all but the smallest business customers in the four MSAs at issue is limited and likely to remain so. *First*, as the FCC has concluded numerous times, cable companies' network location and architecture prevent them from providing DS-1 or DS-3 service on a widespread basis.²⁴ Cable plant typically passes

²³ Qwest also tries to argue that competitors' purportedly successful reliance on its wholesale UNE-platform "commercial" offer somehow demonstrates that UNE loops and transport are unnecessary in the four MSAs at issue. *See, e.g.*, Qwest Minn. Pet. at 17. But the so-called QPP/QLSP offer makes available switching services that are, unlike loops and transport, subject to widespread facilities-based competition. Moreover, competitors that rely on the QPP/QLSP purchase loops and transport as UNEs. The success or failure of competitors that purchase services under the QPP/QLSP is therefore irrelevant.

²⁴ As the Commission recognized in the *TRO*, because hybrid fiber coax ("HFC") networks generally do not serve businesses (*i.e.*, provide services such as DS-1s or DS-3s), "[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints." *TRO* ¶ 52. In the *TRRO*, the Commission concluded that cable companies focus on selling cable modem services to "home offices or very small stand-alone businesses, neither of which typically requires high-capacity [DS-1 or DS-3] loop facilities." *TRRO* ¶ 193. At most, these services are substitutes for DS-0-based services.

primarily residences, and there are many businesses it does not pass. Kunde Dec. ¶ 7. Thus, while Qwest claims that Comcast has a “nearly ubiquitous network and therefore possesses ‘the necessary facilities to provide enterprise services’” (e.g., Qwest Minn. Pet. at 23), competition from cable is only relevant to the extent that cable plant is build out directly to commercial buildings. Qwest has failed to show that this is the case generally let alone in the four MSAs that are the subject of its forbearance request.

Second, most businesses have thus far apparently viewed cable modem service as insufficient for their needs, because “bandwidth, security, and other technical limitations of cable modem service render it an imperfect substitute for service provided over DS-1 loops.” *TRRO* ¶ 193. In addition, the absence of cross elasticity of demand between cable modem service and DS-1 or DS-3 wireline broadband transmission facilities indicates that they are not substitutes for each other.²⁵

The Joint Commenters’ experience in the marketplace demonstrates the limited extent to which businesses view cable company offerings as substitutes to the DS-0, DS-1 and DS-3-based services offered by CLECs. As Richard Batelaan, Cbeyond’s Chief Operating Officer, explains in his declaration, while Cbeyond faces competition from both ILECs and other facilities-based CLECs that rely on UNEs in the SME market, “Cbeyond faces little, if any, facilities-based competition from cable operators or wireless companies.” Batelaan Dec. ¶ 5. In fact, in Denver, the only MSA of the four MSAs at issue in which Cbeyond offers service, Cbeyond lost a total

²⁵ See *TRRO* ¶ 193 (“Commenters also note that businesses that do require DS-1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable. Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.”).

of [proprietary begin] [proprietary end] to cable providers from January to May 2007. *Id.* ¶ 6. The average monthly cable churn rate for this five-month period was

[proprietary begin] [proprietary end]. *Id.*

Eschelon's experience is no different. As Mr. Kunde states, "[i]n my experience, intermodal alternate providers are not viable competitors to Eschelon and other [CLECs]."

Kunde Dec. ¶ 7. Eschelon's data reveals that from the first quarter of 2004 through the end of the second quarter of 2007, Eschelon lost a total of [proprietary begin]

[proprietary end] in the entire state of Colorado to Comcast. Similarly, Eschelon lost a total of

[proprietary begin] [proprietary end] in Minnesota and [proprietary begin]

[proprietary end] in Washington to Comcast during the same period. *Id.* The average quarterly churn rate for cable competition for the ten-quarter period was [proprietary

begin] [proprietary end] in Denver and Washington and [proprietary begin]

[proprietary end] in Minnesota. *Id.* In Arizona, from the first quarter of 2004 through the end of the second quarter of 2007, Eschelon lost a total of [proprietary begin]

[proprietary end] to Cox, but even this number represents a tiny fraction of Eschelon's customer base. In fact, Eschelon's average quarterly churn rate for cable competition over the ten-quarter period in Arizona was a mere [proprietary begin]

[proprietary end]. *Id.*

Moreover, the cable companies themselves agree that their ability to compete in the provision of DS-1 and DS3-based services is extremely limited. In the record of the *Anchorage Order* proceeding, GCI repeatedly explained that, "existing cable technology does not yet permit GCI to provide reliable or economical large-scale DS-1 level services to medium and large

business customers.”²⁶ As a result, GCI can only serve enterprise customers in Anchorage with its fiber plant, which is much less extensive than its HFC plant. Moreover, as explained in footnote 5, *supra*, the Commission essentially agreed with GCI that these limitations preclude GCI from providing a meaningful competitive alternative to the incumbent LEC in Anchorage.

Third, cable companies are unlikely to be able to commit to Service Level Agreements (“SLAs”) when providing service over their HFC networks to business customers. The Joint Commenters have found that offering an SLA is often a necessary prerequisite to serving a medium or large business customer.²⁷ Cable companies’ likely inability to offer SLAs appears to pose a major barrier to serving medium and large business customers over HFC networks.

Fourth, a review of the products advertised by Comcast in the Denver, Minneapolis, and Seattle MSAs and by Cox in the Phoenix MSA further reinforces the FCC’s prior conclusions that HFC-based services appear to be most suited (when they are actually upgraded and cover the relevant geographic area) to serving the smallest businesses and that fiber-based services are better suited to satisfying the demands of enterprise customers. Comcast’s highest speed HFC service provides service at 1 Mbps to 8 Mbps, while “[a]ctual speeds may vary and are not

²⁶ See Letter of John T. Nakahata, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 9 (Nov. 14, 2006); *see also* Letter of John T. Nakahata, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 26-30 (filed July 3, 2006) (“*GCI July 3 ex parte*”); Declaration of Dennis Hardman; attached to *GCI July 3 ex parte*; Declaration of Gene Strid, attached to *GCI July 3 ex parte*.

²⁷ As defined by Newton’s Telecom Dictionary, an SLA is “an agreement between a user and a service provider, defining the nature of the service provided and establishing a set of metrics . . . to be used to measure the level of service provided measured against the agreed level of service. . . . The SLA also typically establishes trouble-reporting procedures, escalation procedures, penalties for not meeting the level of service demanded— typically refunds to users.” NEWTON’S TELECOM DICTIONARY 739 (CMP Books 20th ed. 2004).

guaranteed.”²⁸ The terms and conditions of Comcast’s Business Cable Modem Service state that “Comcast makes no representation regarding the speed of the service other than the placement by Comcast of maximum speeds on Services ordered. Service speeds are approximate and maximum burstable speeds only. Speeds may vary and may be slower than Customer expects at times.”²⁹ By contrast, Comcast’s fiber-based Ethernet Service provides traffic prioritization between different applications as well as “99.97% network availability.”³⁰ Cox’s business class cable modem service for “small business” does not guarantee availability or bandwidth. A disclaimer on its website states: “Actual modem speeds vary. Number of users and network management needs may require Cox to modify upstream and/or downstream speeds. Cox cannot guarantee uninterrupted or error-free Internet service.”³¹ On the other hand, Cox’s “Optical Internet” fiber-based service offers speeds from T-1 to “Gigabit or higher.”³² And SLAs are available to guarantee packet-loss and latency. *Id.*

²⁸ See Comcast Corp., *Comcast Workplace, General Terms and Conditions*, Art. 2.2 (revised August 2007), available at <http://www.comcast.com/MediaLibrary/1/1/Shop/business/documents/WorkplacebundleTCs01Aug07.pdf> (last visited Aug. 31, 2007).

²⁹ See Comcast Corp., *Comcast Workplace, General Terms and Conditions*, Art. 2.2, (revised Aug. 10, 2006), available at <http://www.comcast.com/business/legal/Workplace%20Terms%20and%20Conditions%20081006%20FINAL.pdf> (last visited Aug. 31, 2007).

³⁰ See Comcast Corp., *Enterprise Network Service*, at <http://www.comcastcommercial.com/index.php?option=content&task=view&id=8&Itemid=37> (last visited Aug. 31, 2007).

³¹ See Cox Communications, Inc., *Cox Business Internet*, at <http://www.coxbusiness.com/products/data/businessinternet.html> (last visited Aug. 31, 2007).

³² See Cox Communications, Inc., *Cox Optical Internet*, at http://www.coxbusiness.com/pdfs/CBS60118_COI_DS-0806.pdf (last visited Aug. 31, 2007).

Fifth, to the extent that cable companies are providing DS-1 or DS-3 services, the available evidence indicates that they do so via traditional fiber loop facilities, not their HFC networks.³³ Because their fiber network architectures are similar to intramodal competitors' networks, cable companies likely face many of the same barriers when deploying such loops as intramodal competitors face.³⁴ Cable companies generally deploy their fiber transport networks in rings running through the densest portions of urban areas. From these fiber rings, they seek to deploy fiber laterals to individual end-user customers where the revenue opportunities compensate for the cost of construction. Moreover, laterals can only be connected to "splice points" on the transport network, which are generally located every 2,000 feet. *See TRRO* n.426. Based on these facts, it seems unlikely that a cable company would have the ability to deploy loops to a significantly larger percentage of the commercial buildings in the MSAs at issue than does TWTC.

Given the apparent limitations of HFC networks and the substantial barriers to fiber loop deployment, market analysts have indicated that cable companies have been slow even to attempt to serve medium and large businesses. Where they have begun to serve businesses, cable companies are focusing on serving only very small businesses. For example, one analyst has

³³ For example, in the *TRRO*, the Commission rejected Qwest's assertion that it had lost customers to "intermodal competition" from cable companies because "those losses are to the circuit-switched telephony service offered by Cox's competitive LEC affiliate [which relies on traditional fiber-based loops], rather than to its cable operation." *Id.* ¶ 193, n.514.

³⁴ *See TRRO* ¶ 95 (noting that fiber-based competition from cable companies is captured by the FCC's collocation-based impairment standard). Just like traditional wireline carriers, cable companies, "may collocate in order to access incumbent LEC loops, to interconnect with the incumbent LEC or other carriers, or to provide wholesale transmission services." *Id.* n.270.

indicated that, while “cable companies have recently announced their intention to aggressively enter the *Small Business* segment . . . AT&T has seen very limited activity and we do not expect a significant threat to come from the cable companies.”³⁵ Independent analysts agree that cable companies are generally not competing to provide service to medium and large business customers (those demanding DS-1 and DS-3 level services), “due to MSOs’ lack of national and international footprint, and the stringent requirements of enterprise telecommunications.”³⁶ Larger businesses “require service level agreements (SLAs), a broader array of services and a wider presence” than cable companies apparently provide today in most locations. *Id.*

While ILECs may claim in their pleadings to the FCC that cable companies are important competitors in the market for DS-1 and DS-3 services, their statements to analysts indicate otherwise. When asked by a Wall Street analyst whether BellSouth was “seeing competition in the small-, medium-sized enterprise space,” BellSouth CFO Pat Shannon responded, “Not any — I am sure that our guys see some of them. Some of the better players, like Cox and Time Warner, but [competition] has not risen to a level that I have seen any trends that I could share with you.”³⁷ In its fourth quarter 2006 earnings call, AT&T said this of Cox’s efforts in the business market:

³⁵ Lehman Brothers Equity Research, *AT&T: 3Q Reflects Improving Business Trends*, at 3 (Oct. 24, 2006) (emphasis added).

³⁶ Jim Duffy, *Cable Companies Intensify Enterprise Service Ambitions*, Network World, Oct. 24, 2006, available at <http://www.networkworld.com/news/2006/102406-cable.html?page=1> (last visited Aug. 31, 2007) (“Network World”).

³⁷ See BellSouth Corp., *BellSouth Q2 Earnings Conference Call Transcript (BLS)*, at 15 (July 24, 2006).

They are looking to migrate some of their consumer products predominantly and migrate that into some small business customers. I think their focus will be on the smaller customers, kind of ten lines and under probably four to six lines and under frankly, and when you look at that with respect to our business, that total is only at about the mid single-digits range of our total business. So, it's a sub-segment of the market we go after in small, medium business.”³⁸

Analysts believe that, because of the impediments and barriers to fiber loop deployment, it will be difficult for cable companies to substantially penetrate the market for businesses that demand DS-1 and DS-3 services. To the extent that cable companies serve the business market, they will reportedly need to rely on other carriers' facilities, just as intramodal competitors do. Cable companies will need to “[s]titch[] together [networks] that reach through multiple providers” and this will require “multiple contractual arrangements.”³⁹ Indeed, the head of Cox's business services division notes that Cox will be able to overcome its limited footprint only by interconnecting with other carriers. *Id.* Even if cable companies are able to deliver enterprise class services, they must overcome the apparent perception, carried over from their traditional HFC-based services, that their networks do not provide enterprise class reliability.⁴⁰

³⁸ See AT&T Corp., *AT&T Q4 Earnings Conference Call Transcript (T)*, at 7 (Jan. 25, 2007).

³⁹ Network World at 2.

⁴⁰ According to telecommunications and information technology consulting firm Ovum-RHK, “CIOs at large companies are less apt to trust their mission critical operations and network to cable companies which are relatively new entrants to the market and are not known for having networks with five nines of reliability . . . MSOs still have a long way to go to erase that perception and prove that they are every bit as capable as the big telcos.” *Id.* (quoting Ovum-RHK's analyst Ken Twist).

2. Qwest Has Offered No Evidence Of Substantial Competition From Cable Companies In The Business Market In the Four MSAs At Issue.

It light of the foregoing, it is unsurprising that Qwest offers little evidence concerning intermodal competitors’ ability or willingness to serve business customers in the four MSAs for which it seeks forbearance. For example, Qwest’s claims that intermodal competitors such as cable operators serve as viable alternatives for small and medium enterprise (“SME”) customers are entirely without support. Rather than providing specific evidence of cable companies’ gains in retail business services market share in the four MSAs at issue, Qwest proffers information—the vast majority of which focuses on the *mass market*—taken, and sometimes distorted, from the companies’ websites. *See, e.g.*, Brigham-Teitzel Minn. Dec. ¶¶ 13-17.

For example, in their declaration, Messrs. Brigham and Teitzel describe a map from Comcast’s website which they claim “clearly shows” “Comcast’s cable coverage” in the Minneapolis MSA. *Id.* ¶ 14. The map is actually a media coverage map that they concede in a footnote is “offered to potential advertisers as a representation of the geographic reach advertisers can expect when using the Comcast network to distribute advertising.” *Id.* ¶ 14 & n.24. Nonetheless, without any explanation of their methodology, Messrs. Brigham and Teitzel deduce from “this Comcast media coverage map” that “the Comcast network serves Qwest wire centers that contain . . . approximately *** of Qwest’s switched business lines in the Minneapolis-St. Paul MSA.” *Id.* ¶ 14 & n.26. But the fact that an advertiser may reach a certain “number of cable households [*i.e.*, the mass market customers] in the Minneapolis-St. Paul Designated Market Area (‘DMA’)” is in no way indicative of the level of intermodal competition in the provision of DS-1 or DS-3-based business services in any of the wire centers in the

Minneapolis-St. Paul MSA. *Id.* n.24. Moreover, Qwest’s assertion that Comcast’s network “serves Qwest wire centers” is misleading, because Qwest does not say what geographic area or what types of customers Comcast serves in any particular wire center. Indeed, Comcast would arguably “serve” a Qwest wire center if it had only a few mass market customers in that wire center, but this level of network coverage is obviously insufficient to justify forbearance in any product market.

The other statements that Qwest offers in support of its claim that Comcast provides a viable alternative to Qwest in the retail market for business services are makeweight. The facts that Comcast management is “thrilled” to hire a new president of business services (*id.* ¶ 18) or that Comcast sees the enterprise market as “the next great business opportunity” (*e.g.*, Qwest Minn. Pet. at 23) are irrelevant. Neither statement offers any basis for concluding that Comcast has or will offer a viable, ubiquitous facilities-based alternative to Qwest in the SME market.

Qwest also fails to provide any specific evidence that Cox serves as a facilities-based alternative for SMEs in the Phoenix MSA. Qwest has no data, let alone any product market- or geographic market-specific data, on Cox’s purportedly “very extensive” cable networks used to serve business customers.⁴¹ Nor does Qwest point to any detailed statistics regarding the number of business customers Cox serves using its own facilities in the wire centers in the Phoenix MSA. Rather, Qwest relies on the Commission’s statements in the *Omaha Order* regarding Cox’s “strong success in the mass market” and “its current marketing efforts” to business

⁴¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area, WC Dkt. No. 07-97, at 21 (filed Apr. 27, 2007) (“Qwest Phoenix Pet.”).

customers in the *Omaha* MSA as evidence of the existence of competition from cable in the *Phoenix* MSA. In addition, Qwest's assertion that Cox "has established a separate marketing division" (*id.* at 22) to focus on SME customers is not indicative of any existing or potential success in serving this market in the Phoenix MSA. In addition, Qwest's reliance on Cox's success in winning a contract to serve the State of Arizona "to provide communications services to the *state government*" (*id.* at 23) (emphasis added) is immaterial to the question of whether Cox is serving as an alternative facilities-based provider in the *business* market. In fact, Qwest does not even indicate whether the types of services Cox will provide to the State of Arizona are the types of services for which Qwest seeks forbearance. Furthermore, notwithstanding the fact that Qwest cites nothing to support its claim that "Cox has over *** route miles of fiber in the Phoenix MSA" (*id.* at 22), as explained in Section III.B.2 *supra*, the mere presence of non-ILEC fiber is not evidence of competitive deployment of loops at DS-1 or DS-3 capacity or any other capacity for that matter.

In sum, cable companies still have significant barriers to overcome in serving the DS-1 and DS-3 market to any substantial degree. Even if they could overcome these barriers in some locations in several years' time with unforeseen technologies or unannounced network expansions, such developments are irrelevant as to whether cable companies are "willing and able" to serve enterprise customers today in the four MSAs within a "commercially reasonable time." *Omaha Order* ¶ 69. Finally, if cable companies do develop the ability to provide DS-1 or DS-3 circuits to businesses, the presence of a single facilities-based competitor would be insufficient to give Qwest "very strong market incentives" to offer DS-1 or DS-3 facilities to

competitors in the downstream retail market, as McLeodUSA's experience in Omaha demonstrates.

IV. THERE IS NO BASIS FOR A PREDICTIVE JUDGMENT THAT INTRAMODAL OR INTERMODAL COMPETITION WILL CONSTRAIN QWEST'S MARKET POWER OVER THE WHOLESALE INPUTS TO DS-0, DS-1, AND DS-3-BASED SERVICES.

If the Commission were to grant forbearance from Qwest's unbundling obligations in the four MSAs at issue, the consequences are predictable. As it has in Omaha, Qwest would raise its rivals' costs, placing them in a price squeeze that would substantially diminish or entirely eliminate competition in the business market.

A. The Commission's Prediction In The *Omaha Order* Has Proven To Be Incorrect.

In the *Omaha Order*, the Commission made a "predictive judgment" that, as a result of competition in the mass market from Cox, "Qwest will not react to our decision here [to relieve Qwest of unbundling obligations in certain wire centers] by curtailing wholesale access to its analog, DS0, DS1 or DS3-capacity facilities." *Id.* ¶ 79. But McLeodUSA's experience in Omaha demonstrates that the FCC's prediction was erroneous. Rather than offer reasonable wholesale pricing for DS-0, DS-1, and DS-3 loops, Qwest has only offered McLeodUSA access to its loop facilities at special access rates from its FCC Tariff No. 1.⁴² Unlike UNEs, which must be sold at cost-based rates, tariffed, special access services are largely unregulated. The

⁴² See Petition for Modification of McLeodUSA Telecommunications Services, Inc., *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Dkt. No. 04-223, at 4 (filed July 23, 2007) ("McLeodUSA Petition").

result is that Qwest is demanding substantially higher prices for DS-0 and DS-1 loops. As McLeodUSA summarizes,

Qwest has proposed only uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers [in the Omaha MSA]. Its demands include prices increases in the range of 30% or more for monthly charges for DS0 stand alone loops, a minimum increase of 86 percent for DS1 access loops, and a 360% increase in associated non-recurring charges for installing DS1 access loops. . . . Qwest's actions cannot be reconciled either with the Commission's confidence that market incentives would motivate it to meet its obligations to provide wholesale access to network elements pursuant to Section 271, or with the public interest standard articulated in Section 10(c).

Id. at i. Because it is not economical for McLeodUSA to use Qwest's post-forbearance offerings to provide DS-0 or DS-1-based services to business customers, McLeodUSA has publicly announced that it will discontinue its operations in the Omaha MSA if the Commission does not modify its *Omaha Order*.⁴³ Moreover, McLeodUSA has been unable to sell its facilities because potential buyers have been deterred by the "lack of reasonable wholesale pricing for last mile loop facilities." McLeodUSA Petition at 18.

As a direct result of McLeodUSA's difficulty in negotiating reasonable "commercial" pricing for voice-grade and high-capacity loops from Qwest, Integra abandoned its plans to enter the Omaha MSA.⁴⁴ As McLeodUSA explains,

⁴³ McLeodUSA Petition at 14 ("The nine affected wire centers represent the vast majority of revenue opportunity of McLeodUSA's current and prospective customer base. Accordingly, McLeodUSA is being forced to exit all Omaha wire centers because there is simply not enough revenue potential in the unaffected Omaha wire centers to justify the ongoing operating costs of the local switching center and related expenses.").

⁴⁴ *Id.* at 18 (citing Comments of Integra Telecom, Inc., *In re Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Statistical Areas*, WC Dkt. No. 06-172, at 4-5 (filed Mar. 5, 2007)).

Integra found that it was “substantially less attractive economically to enter the Omaha market without access to unbundled network elements at TELRIC rates in the entire Omaha market” and decided that the investments it was prepared to make to provide service in Omaha would be better utilized in other markets. It emphasized . . . that it would be extremely difficult for a CLEC to provide service to small and medium business customers in competition with the ILEC if loops and transport were priced at special access rates.

Id.

Thus, the experience of CLECs in the Omaha MSA demonstrates that unbundling requirements are necessary in the absence of market-based incentives to ensure that Qwest does not engage in similar anticompetitive conduct in the Denver, Minneapolis, Phoenix, and Seattle MSAs.

B. If Qwest’s Forbearance Request Were Granted, Competitive Carriers Would Be Price Squeezed Out Of The Market For DS-0, DS-1, and DS-3-Based Services.

If Qwest’s instant forbearance request were granted, the experience of intramodal competitors in the four MSAs at issue will be no different from that of McLeodUSA and Integra in the Omaha MSA. The elimination of UNEs would leave Qwest’s wholesale customers, by virtue of Qwest’s control over essential local transmission facilities, no choice but to rely on loop and transport facilities as special access at significantly higher rates, resulting in a price squeeze.

Eschelon recently conducted studies of the likely financial impact of the elimination of UNEs on its business in the four MSAs at issue.⁴⁵ The studies examined the costs it incurs to provide services via DS-1 enhanced extended loops (“EELs”), stand-alone DS-1 loops and DS-0 loops in the Denver, Minneapolis, Phoenix, and Seattle MSAs and the changes to Eschelon’s operating margins in the event that Qwest’s forbearance request were granted. *Id.* The results of

⁴⁵ Declaration of William D. Markert On Behalf Of Eschelon Telecom, Inc. ¶ 3 (attached hereto as Attachment D) (“Markert Dec.”).

the studies were that for DS-1 EELs, Qwest's special access prices would increase Eschelon's costs to the point that its operating cash flow margin would be approximately **[proprietary begin]** **[proprietary end]** in each density zone of the MSAs at issue. *Id.* ¶ 6. According to William Markert, Eschelon's Executive Vice President of Network Financial Management, at that point, "financial institutions would not extend credit to Eschelon nor would potential investors invest in the company," and as a result, "Eschelon would be forced to exist the market for DS-1-based services in these four MSAs." *Id.* Mr. Markert also notes in his analysis that, without the constraining effect of the availability of UNEs, Qwest might increase its special access prices even further. *Id.* ¶ 7. Moreover, in addition to increasing the costs of wholesale inputs, Qwest may simultaneously decrease its retail prices. *Id.* According to Mr. Markert, Qwest has in fact already done so by offering a promotional retail rate of \$461.00 for a DS-1 EEL. *Id.* & n.2. The result of Qwest's exercise of its market power in this manner would be to impose a price squeeze on Eschelon, rendering it unable to make a profit and thereby forcing it to withdraw from the DS1-based services market. *Id.* ¶ 7. Mr. Markert's DS-0 loop cost study **[proprietary begin]** **[proprietary end]**. While the stand-alone DS-1 loop cost study **[proprietary begin]** **[proprietary end]**, the margins across all density zones in the four MSAs at issue were **[proprietary begin]** **[proprietary end]** *Id.* ¶ 8.

C. There Is Even Less Evidence To Support A Prediction That Cable Companies Would Expand Their Entry In The Business Market In The Four MSAs At Issue Than Was The Case In Omaha.

While the Commission's predictive judgment that Cox's presence in the Omaha MSA (along with other factors) would constrain Qwest's exercise of market power has proven to be patently wrong, there is even less support for the Commission to make a similar judgment with respect to competition in the Denver, Minneapolis, Phoenix, and Seattle MSAs. Comcast has made far less progress in entering the enterprise market in the MSAs in which it is the dominant cable provider (*i.e.*, Denver, Minneapolis, and Seattle) than Cox had made in Omaha. As Comcast explained in its opposition to Verizon's petitions for forbearance from unbundling obligations in six MSAs,⁴⁶ Verizon "clearly exaggerate[ed]" its market share loss to Comcast or other competitors. *Id.* at 3. There, Comcast stated unequivocally that "Verizon does not face competition from Comcast (or anyone else) in Boston, Philadelphia or Pittsburgh anything like Qwest faced in Omaha." *Id.* at 4.

The situation is no different in the four MSAs at issue here. According to the Commission's own data, as of June 2006, ILECs held an 81 percent market share in Colorado, and market shares of 77 percent and 86 percent, respectively, in Minnesota and Washington.⁴⁷ Thus, the competition faced by Qwest from Comcast and other non-ILEC providers in the Denver, Minneapolis, and Seattle MSAs is nowhere near the level of competition that the

⁴⁶ Comments of Comcast Corporation, *In re Petitions of Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Dkt. No. 06-172 (filed Mar. 5, 2007).

⁴⁷ Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Trends in Telephone Service*, Table 8.6 (Feb. 2007).

Commission apparently found in the Omaha MSA. Similarly, FCC data indicates that ILECs had a market share of 70 percent in Arizona. *Id.* In light of this evidence and in the absence of any material evidence to the contrary, there is no reason to believe Qwest's exaggerated claims that Cox "has already been successful in serving business customers in the [Phoenix] MSA." Qwest Phoenix Pet. at 23.

Furthermore, in light of the build-buy analysis conducted by TWTC discussed earlier, Qwest's reliance on the FCC's prediction in the *Omaha Order* that Cox would compensate for the limited reach of its network in the Omaha enterprise market by expanding it is misplaced. As explained, there are few commercial buildings to which TWTC could construct loop and transport facilities in the Denver, Minneapolis, Phoenix, and Seattle MSAs. The situation would be no different for Comcast or Cox in these MSAs. This is because, as discussed above, cable companies face many of the same entry barriers as TWTC and other intramodal competitors in this regard, thereby making it unlikely that cable operators will be able to expand the range of their networks in the business market to any significant extent for the purpose of providing DS-1 and individual DS-3-based services.

VII. CONCLUSION.

For the foregoing reasons, Qwest's petitions for forbearance should be denied.

Respectfully submitted,

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